UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 5-95CR-074-C
	)	
v.	)	Filed: 12/12/95
	)	
OBERKAMPF SUPPLY OF LUBBOCK, INC.;	)	Violation:
	)	
CYRIL REASONER; AND	)	15 U.S.C. § 1
	)	
CLOWE & COWAN, INC.,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO MOTION OF CLOWE & COWAN, INC., TO ENTER A PLEA OF NOLO CONTENDERE

The United States of America, by its undersigned attorneys opposes the motion of Clowe & Cowan, Inc., for leave to withdraw its Plea of not guilty and enter a plea of Nolo Contendere.

INTRODUCTION.

Clowe & Cowan, Inc., Oberkampf Supply of Lubbock, Inc., and Cyril Reasoner were indicted on September 28, 1995 for having entered into and engaged in a combination and conspiracy to suppress and restrain competition by fixing prices for the sale of certain wholesale plumbing supplies in unreasonable restraint of interstate trade and commerce in violation of Section One of the Sherman Act (15 U.S.C. § 1). This indictment flows from grand jury investigations in multiple districts within the State of Texas.

On October 5, 1995, in Criminal Case No. 5-95-CR0068-C, Ronal G. Skelton, waived proceeding by indictment and pleaded guilty to an information charging that he entered into and engaged in a combination and conspiracy to suppress and restrain competition by fixing prices for

the sale of wholesale plumbing supplies sold by Clowe & Cowan, Inc., in unreasonable restraint of interstate trade and commerce in violation of Section One of the Sherman Act (15 U.S.C. § 1). During all periods relevant to this conspiracy, Mr. Skelton was Vice President of Purchasing for Clowe & Cowan, Inc.

To the extent Clowe & Cowan disputes the nature of the charge against it, or the evidence, the government would also point out that Ron Skelton's affidavit (Exhibit B to the motion of Clowe & Cowan) admits the following at item 4. (in pertinent part):

> "I attended . . . meetings in Lubbock where prices were discussed, . . . the last sometime in early October, 1990 . . ."

On its face movant's own exhibit admits the participation of movant's vice president in the identical activities in Lubbock which give rise to this indictment, and that this participation continued into the statutory period, that is within five years preceding the filing of the indictment.

APPLICABLE LAW

Rule 11(b), Fed. R. Crim. P., which governs nolo contendere pleas provides:

> A defendant may plead nolo contendere only with the consent of the Court. Such a plea shall be accepted by the Court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

The Defendant carries a heavy burden to justify a nolo contendere plea. In exercising its discretion, the Court must decide whether accepting this plea is "in a general and all encompassing sense, in the public interest." United States v. Dynalectric Co., 674 F. Supp. 240, 241 (W.D. Ky. 1987). Pleas of nolo contendere "are generally looked upon with disfavor and should be accepted only in the most exceptional circumstances." United States v. Brighton Bldg. and Maintenance Co.,

431 F. Supp. 1118, 1121 (N.D. Ill. 1977), aff'd, 598 F.2d 1101 (7th Cir. 1979), cert. denied, 444 U.S. 840 (1980). In United States v. Standard Ultramarine and Color Co., 137 F. Supp. 167, 173 (S.D. N.Y. 1955), the Court focusing specifically on this point, ruled:

> Absent compelling factors, to grant the motion [to accept a plea of nolo contendere] is virtually to rule that a defendant in an antitrust proceeding is entitled to plead nolo contendere as a matter of right. The discretion of the Court should be exercised favorably only when special circumstances are present.

In determining whether exceptional circumstances exist to justify accepting a nolo plea, the Court may consider a number of factors. The most commonly accepted factors are set forth in the Ultramarine case, supra, and quoted in Defendant's memoranda; however, since each case and motion must be considered in its own particular context, rigid adherence to any laundry list of factors is unwise. United States v. Dynalectric Co., 674 F. Supp. at 241.

Because Defendant relies on the Ultramarine factors to support its motion, the government will respond to each of these factors:

Nature of claimed violations. The price-fixing violation charged in the instant Indictment is a per se violation of the antitrust laws and, thus, one of the most serious violations encompassed by the Sherman Act. Because of the serious nature of per se antitrust offenses, they are conclusively presumed to be unreasonable and therefore illegal because of their "pernicious effect on competition and lack of any redeeming virtue." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, (1958).

Defendant, however, attempts to minimize the serious nature of this violation. The seriousness of antitrust offenses is shown by the penalties: jail terms of up to three years for

individuals and fines of up to $350,000 for individuals and up to $10 million for corporations. 15 U.S.C. § 1.

Moreover, the evidence in this case will show that Ronal Skelton traveled from Amarillo on behalf of Clowe & Cowan to attend three meetings in Lubbock in 1990. At these meetings, Skelton and other Clowe & Cowan employees met with representatives from competing companies in Lubbock, discussed prices being charged for wholesale plumbing supplies, and agreed to fix and maintain such prices. Throughout the duration of the conspiracy, prices on various items were fixed, including tubs, faucets, water heaters, and PVC-DWV fittings, among others.

How long the violations persisted. Despite the serious nature of the offense charged in this Indictment, the Defendant contends that the limited duration of the charged conspiracy entitles it to plead nolo contendere. This argument ignores the possibility that this conspiracy did not continue for reasons totally extraneous to any action taken by the Defendant. The evidence in this case will show that these Defendants expected the price-fixing agreements to last much longer and to have a much greater impact than they ultimately did. There is no evidence that the return to competitive pricing occurred because of any action of the Defendant in this case.

Thus, the short duration of this offense does not reflect the intent or the expectations of the conspirators at the time they entered into this price-fixing conspiracy. They expected the conspiracy to last indefinitely. Since, at the time, Clowe & Cowan, Inc. contemplated a much longer conspiracy, it should not now be heard to claim the limited duration of the conspiracy as a basis for leniency.

Size and power of Defendant. Clowe & Cowan, Inc., argues that it should be allowed to plead nolo because it was among the small players in this market. The Government would submit that Clowe & Cowan, Inc., was one of only four "players" in the market and the evidence will show that

Clowe & Cowan, Inc.'s participation in the conspiracy was essential to the prospects of success held by all participants. The weight to be given to any evidence presented through co-conspirators who have entered into plea agreements is a matter for the trier of fact. It is true that Clowe & Cowan, Inc., is the only co-conspirator to have sought leave to plead nolo contendere at this time.

Impact of the condemned conduct on the economy. The Defendant argues that the de minimus economic impact of this price-fixing conspiracy should be considered as a factor supporting its request to plead nolo contendere. Unfortunately, the Defendant may want to reap the benefit of a situation it did not create. Evidence of reasons why the impact of this conspiracy was not greater bears no relationship to a lack of effort by Clowe & Cowan.

It is true that a plea of nolo contendere does not preclude imposition of an appropriate sentence, but the deterrent effect of a criminal prosecution does not come solely from the sentence imposed. In American Bakeries, 284 F. Supp. at 868, the court observed that:

> Today, however, [a plea of nolo contendere] has become a face-saving devise. The public does not attach the same stigma to nolo contendere pleas as it does to pleas of guilty or convictions after pleas of not guilty. [Citations omitted] If nolo is merely a means by which "violators may expiate their wrongdoing by payments of token fines -- by accepting the proverbial 'slap on the wrist' -- ... then a powerful deterrent to law violation has been removed." [Citation omitted.]

The public perception of guilty pleas is extremely important in deterring antitrust violations, and violators should have to confront the negative public notoriety associated with their crime. Unfortunately, allowing this Defendant to plead nolo may send a message to other antitrust violators that the worst they have to fear from their criminal conduct is a "gentlemanly disposition" which can

be explained away as a "settlement." This message reduces the effectiveness of the antitrust laws and will not have the same deterrent effect as would a guilty plea or a conviction.

View of Attorney General. Under Department policy Antitrust Division attorneys should and will oppose pleas of nolo contendere except in extraordinary circumstances, i.e., "that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest." See, Principles of Federal Prosecution (July 1980) at page 33. Considering the circumstances of this case, under the applicable legal standards we cannot conclude that they are so unusual that acceptance of a nolo plea would be in the public interest.

Public Interest. Acceptance of a nolo plea will neither eliminate the need for a trial in this case nor significantly reduce the length or complexity of the trial of this case because two Defendants would still remain. Because there will be no substantial savings in judicial resources, the public interest in the effective administration of justice is best served by denying Defendant's request to plead nolo contendere and requiring that the issue of the moving Defendant's guilt be resolved swiftly and certainly. Since a trial must necessarily be held respecting the non-moving Defendants in this case, there is no reason to exclude Clowe & Cowan, Inc.

While a plea of nolo contendere, for all practical purposes from the standpoint of punishment is comparable to a plea of guilty, there is, however, a material difference when considering the fact that a nolo contendere plea may not be used against a defendant as an admission in any subsequent civil or criminal proceeding. U.S. v. MAPCO Gas Products, Inc., 709 F. Supp. 895, 897 (E.D.Ark. 1989). The existence of a pending civil suit rising out of the Amarillo market appears to be a non-issue, however. Neither a plea of nolo contendere, nor a conviction of the Defendant for its

activities in Lubbock would appear to give private litigants in Amarillo any conceivable benefit, given the lack of identity of parties and markets between Amarillo and Lubbock.

Despite the Court's sentencing discretion, there is no denying that in the public's mind, a nolo contendere plea signifies a lesser degree of culpability and responsibility for criminal behavior. To accept nolo contendere pleas in white collar antitrust cases erodes the public confidence in the fairness of the system.

Respectfully submitted,

_____/s/_____
WILLIAM C. MCMURREY

_____/s/_____
GLENN A. HARRISON

Attorneys
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
(214) 655-2700

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Government's Response to Motion of Clowe & Cowan, Inc., to Enter a Plea of Nolo Contendere mailed on the ___th day of _____, 1995, to

Daniel W. Hurley, Esq.
Hurley & Sowder
Attorney at Law
1703 Avenue K
Lubbock, Texas 79401

Mark G. Daniel, Esq.
Evans, Gandy, Daniel & Moore
Sundance Square
115 West Second Street
Suite 202
Fort Worth, Texas 76102

A. W. SoRelle III, Esq.
Underwood, Wilson Berry, Stein & Johnson
Attorneys and Counselors at Law
1500 Amarillo National Bank Building
P.O. Box 9158
Amarillo, Texas 79105-9158

_____/s/_____

WILLIAM C. MCMURREY
Attorney